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LIBRARY OF CONGRESS

U.S. Copyright Office

[Docket No. 2015-01]

Copyright Protection for Certain Visual Works

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: The U.S. Copyright Office is reviewing how certain visual works, particularly photographs, graphic artworks, and illustrations, are monetized, enforced, and registered under the Copyright Act. The Office seeks commentary on the current marketplace for these visual works, as well as observations regarding the real or potential obstacles that authors, and, as applicable, their licensees or other representatives face when navigating the digital landscape. This work builds upon previous studies and public inquiries in a number of areas, including small claims, the making available right, resale royalties, registration, recordation, and the interoperability of records. As always, the Office is interested in the perspectives of copyright owners as well as users of these creative works. This is a general inquiry that will likely lead to additional specific inquiries.

DATES: Comments are due [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Reply comments are due [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: All comments should be submitted electronically using the comment submission page on the Office website at <http://copyright.gov/policy/visualworks/>. To meet accessibility standards, submitters must upload comments in a single file not to exceed six (6) megabytes (MB) in one of the following formats: the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include the submitter's name and organization (if any). The Office will post all comments publicly on the Office's website exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202-707-8350 for special instructions.

FOR FURTHER INFORMATION CONTACT: Catherine Rowland, Senior Advisor to the Register of Copyrights, by telephone at 202-707-8350 or by electronic mail at crowland@loc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Copyright Act¹ has long protected photographs, graphic artworks, and illustrations, which encompass a wide range of formats, from fine art pieces to duplications of fine art to media photographs to political cartoons and images created to enhance or sell popular products or services. Whether these works are created by one's own hand or using a computer program, significant creative talent is frequently involved. The types of authorship also vary greatly. Some authors are professionals who spend

¹ 17 U.S.C. §§ 101 *et seq.*

many years creating unique portfolios for the sake of art or for commercial customers, and who publish and license their works with the expectation that they will be properly attributed and compensated. Others are amateurs or hobbyists who create or disseminate images on an informal basis using mobile phones and other consumer devices as well as social media.

Photographs, graphic artworks, and illustrations have had a broad impact on U.S. culture. Few would question the iconic importance of photographs like Dorothea Lange's "Migrant Mother," which epitomize eras of American history. Photographs that document current events often provide gripping images that illuminate critically important news of the day. For example, the remarkable image of firefighters raising an American flag amidst the wreckage of the World Trade Center provides an intense connection to the events of September 11, 2001, and is, in fact, the subject of recent litigation. Media art such as political cartoons provide commentary as well as entertainment; graphic art is everywhere in popular culture and on products; and professional illustrations such as those depicting medical instruction are crucial to educational texts. In short, images are ubiquitous and essential to life in the twenty-first century.

Despite the protections afforded by the Copyright Act and the prevalence of such works in society, authors face significant challenges in the modern era. Photographers note that "the average revenues for working photographers declined over the past year ... [and] visual artists remain the group most vulnerable to the unauthorized uses of their

works while being the group least financially able to bear the resulting economic losses.”²

An illustrator recounts that “[i]t has been a constant battle to educate the good faith persons who have used my art [in an] unauthorized [manner] because they found the works in media where pirates had deliberately deleted my copyright watermark and published my images illegally.”³ Finally, the Graphic Artists Guild explains that “50 percent of the people who are infringing are not responding before any legal action is taken. They are not responding to the rights holder or their attorney who asks them to stop, to cease and desist, or ask for money.”⁴

Regarding monetization, in the online era, many individuals and companies seek to use photographs and other illustrations to further their businesses. Some of these users license images from the authors or their representatives, *e.g.*, stock photography companies. However, many authors are likely missing opportunities to monetize their works. These difficulties may be heightened when photographs, graphic artworks, and illustrations are embedded into other works that are the subject of licenses between third parties.

Many of these works “are particularly vulnerable to orphaning”⁵ because the identity of the rights holder often is not included on the face of a work. In the digital world, some authors embed copyright information in their works, but this rights

² Comments of American Society of Media Photographers in Response to U.S. Copyright Office’s Oct. 22, 2012 Notice of Inquiry on Orphan Works and Mass Digitization (“Orphan Works NOI”), at 3 (Feb. 4, 2013).

³ Comments of Gerrity Medical Art in Response to Orphan Works NOI, at 1 (Feb. 4, 2013).

⁴ U.S. Copyright Office Hearing on Small Copyright Claims, Tr. at 266:17-21 (Nov. 16, 2012) (Lisa Shaftel, Graphic Artists Guild), *available at* <http://copyright.gov/docs/smallclaims/transcripts/>.

⁵ Comments of Association of Medical Illustrators in Response to Orphan Works NOI, at 1 (Feb. 4, 2013).

management information may be unlawfully stripped from digital copies.⁶ This, in turn, makes it very difficult for potential users to contact the copyright owner to obtain a license to use visual works they may find (*i.e.*, on websites), and thus decreases artists' opportunities to monetize their works.

The significant enforcement challenges also pose substantial difficulties. For example, “[p]urloining of [photographs], whether produced for use by multi-national corporations for advertising purposes, use on apparel, product packaging or reportage, has become routine.”⁷ Authors have found that “[c]opyright infringement is rampant, especially by copying of digital works and the scanning [of] visual works into digital format.”⁸ Accessing a photograph, graphic artwork, or illustration online is generally simple and images can frequently be copied or downloaded with ease, thus making it effortless for third parties to use images without permission.

Authors and licensees who try to pursue infringements may face an uphill battle. Litigation can be costly and expensive, and while the monetary harm of an individual infringement may be low, the impact of numerous infringements can be quite high. Similar issue are at play with the Copyright Act’s notice and takedown procedures, which, while a valuable mechanism, can provide an incomplete or challenging solution for small authors.

The Copyright Office has been concerned for some time about these and related issues. For example, in recent years, the Office studied and proposed the possibility of an

⁶ This removal of rights information may violate Section 1202 of the Copyright Act but is difficult to police.

⁷ Comments of American Photographic Artists in Response to U.S. Copyright Office’s Oct. 17, 2012 Notice of Inquiry on Remedies for Small Copyright Claims (“Small Claims NOI”), at 3 (Jan. 17, 2012).

⁸ Comments of Graphic Artists Guild in Response to Small Claims NOI, at 3 (Jan. 16, 2012).

alternative dispute resolution process for copyright claims that have a low economic value,⁹ the possibility of a resale royalty for certain visual art works,¹⁰ and the importance of the making available right in the online environment.¹¹ The Office has also looked extensively at the problem of orphaned photographs and artworks, and how best to facilitate an exchange between a good faith user and a rightful owner.

Aside from legal solutions, the Copyright Office is mindful of emerging practical solutions. Through an academic partnership with Stanford Law School, the Office has focused its attention on the subject of photographs and licensing gridlock. Stanford's students are exploring ways to centrally assemble information concerning marketplace resources for the licensing of photographs and the data standards relied upon by copyright owners and licensees to engage in such transactions. This project will not only serve creators and their customers, but will also help to inform the Copyright Office as it further adopts or, as necessary, establishes, global identifying information for copyright registration and recorded transactions. Across the sea, the United Kingdom's Copyright Hub is working on a prototype for transactions involving photographs as its first major project. And the Internet Task Force of the Department of Commerce recently explored photography questions as part of a broader public meeting hosted by the U.S. Patent and Trademark Office about facilitating the online licensing environment.¹²

⁹ See <http://copyright.gov/docs/smallclaims/>.

¹⁰ See <http://copyright.gov/docs/resaleroymalty/>.

¹¹ See http://copyright.gov/docs/making_available/.

¹² See U.S. DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, Facilitating the Development of the Online Licensing Environment for Copyrighted Works, Apr. 1, 2015 Agenda, *available at* <http://www.uspto.gov/learning-and-resources/ip-policy/copyrights>; *see also* U.S DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013) (the "Green Paper").

Finally, photographers, graphic artists, and illustrators face challenges when registering their copyrights. Many photographers, for example, are prolific, creating thousands of works per year or even per week or month. Because it can be expensive to register these works on an individual basis, the Copyright Office has provided certain group alternatives. At the same time, the Office also must provide an effective public record that includes sufficient detail regarding who has created what. Statutory damages are available against a user when an author has timely registered a work, and thus the granularity of the record is critical. For this reason, while group options are helpful, they have to be carefully calibrated. How to improve the registration record by leveraging technology solutions is thus a priority.

II. Subjects of Inquiry

The Office invites comments that address the subjects listed below. When submitting a comment, please identify the nature of your interest in this subject (*e.g.*, whether you are a creator, licensee, *etc.*):

1. What are the most significant challenges related to monetizing and/or licensing photographs, graphic artworks, and/or illustrations?
2. What are the most significant enforcement challenges for photographers, graphic artists, and/or illustrators?
3. What are the most significant registration challenges for photographers, graphic artists, and/or illustrators?

4. What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic art works, and/or illustrations?
5. What other issues or challenges should the Office be aware of regarding photographs, graphic artworks, and/or illustrations under the Copyright Act?

III. Conclusion

If there are any additional pertinent issues not discussed above, the Office encourages interested parties to raise those matters in their comments.

Dated: April 21, 2015.

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Senior Advisor to the Register of Copyrights.

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